

Statement by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, February 28, 2020, Reconvened on March 5, 2020

8. UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

A. REPORT OF THE APPELLATE BODY (WT/DS505/AB/R AND WT/DS505/AB/R/ADD.1) AND REPORT OF THE PANEL (WT/DS505/R AND WT/DS505/R/ADD.1)

- The United States has serious concerns with the documents being considered by Members under this agenda item.
- In particular, the document circulated as WT/DS505/AB/R heightens the concerns that the United States has been raising about the Appellate Body and its effect on the WTO dispute settlement system.
- As the United States will explain in this statement, the document is not a valid Appellate Body report and represents the latest example of the Appellate Body’s failure to respect WTO rules.
- The document circulated by the Appellate Body is not a valid Appellate Body report under Article 17 of the DSU.¹
- The document was not provided and circulated on behalf of three valid Appellate Body members as required by Article 17.1. Extraordinarily, none of the individuals serving on this appeal – Mr. Ujal Bhatia (presiding member), Mr. Thomas Graham, or Ms. Hong Zhao – was a valid member of the Appellate Body when the document was issued to WTO Members.
- With respect to the first two, this dispute presents the familiar issue of individuals continuing to serve and decide appeals after their term of appointment has expired. The U.S. position that this is illegitimate is well known.
- But we will first discuss service on this appeal by Ms. Zhao. This is an unprecedented situation. This individual cannot be, and is not, a member of the Appellate Body because she is not eligible under the DSU.
- On January 31, 2020, the United States informed the WTO Director-General and the DSB Chairperson that it had become aware of information that indicates this individual is not “unaffiliated with any government” as required by Article 17.3 of the DSU and,

¹ *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”).

therefore, is not a valid member of the Appellate Body.

- Article 17.3 of the DSU provides that persons comprising the Appellate Body “shall be unaffiliated with any government.” To “affiliate” is to “attach to or connect with an organization,”² and an affiliation is a “connection, association.”³
- Ms. Zhao is affiliated with the Government of the People’s Republic of China and therefore cannot serve as a member of the Appellate Body.
- According to official Chinese government documents, Ms. Zhao currently serves as Vice President and a “leader” of China’s “Ministry of Commerce Academy of International Trade and Economic Cooperation” (MOFCOM-AITEC).
- When Ms. Zhao was nominated as a candidate for the Appellate Body, her *curriculum vitae* (CV) indicated that she was at that time serving as the “Vice President of the Chinese Academy of International Trade and Economic Cooperation.”⁴ Ms. Zhao’s CV did not reflect the official title for this entity: the “*Ministry of Commerce* Academy of International Trade and Economic Cooperation.”⁵ Although there are different potential translations for the name of this entity,⁶ the official title in Chinese includes “Ministry of Commerce.”
- Ms. Zhao continues to serve as Vice President of the Ministry of Commerce Academy of International Trade and Economic Cooperation.⁷ The “leadership” page on the MOFCOM-AITEC website also identifies Ms. Zhao among its six current leaders.⁸

² *The New Shorter Oxford English Dictionary* (1993) at p. 35 (definition 2: “Adopt as a subordinate member of a society, branch of an organization or company, etc.; attach *to* or connect *with* an organization etc.”). WTO Members in 1995 considered that, in light of Article 17.3, persons serving on the Appellate Body “should not therefore have any attachment to a government that would compromise their independence of judgment.” Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 7.

³ *The New Shorter Oxford English Dictionary* (1993) at p. 35 (definition 2(b)).

⁴ JOB/DSB/CV16/3.

⁵ See, e.g., MOFCOM-AITEC Website, Profile page, Ms. Zhao’s biography (indicating at the bottom of the webpage “All rights reserved: Ministry of Commerce Academy of International Trade and Economic Cooperation”) The biographies for three of the six MOFCOM-AITEC vice presidents refer to the “Ministry of Commerce Academy of International Trade and Cooperation”. Two do not refer to MOFCOM-AITEC. Ms. Zhao’s biography is the only one that refers to MOFCOM-AITEC as the “Chinese Academy of International Trade and Economic Cooperation.”

⁶ See, e.g., Notice of the Ministry of Commerce on the Establishment of Institutions (translating the name of this entity as “International Trade and Economic Cooperation Research Institute **of the Ministry of Commerce**”) (emphasis added).

⁷ MOFCOM-AITEC Website, Profile page, Ms. Zhao’s biography.

⁸ MOFCOM-AITEC Website, Leadership.

- This entity is a “public institution” under Chinese law that is affiliated with and subordinate to China’s Ministry of Commerce. In the “Notice of the Ministry of Commerce on the Establishment of Institutions,”⁹ China explicitly identifies MOFCOM-AITEC’s status as a “public institution.” Under Chinese law, a “public institution” refers to “public service organizations that are established by the state organs or other organizations by using the state-owned assets for the purpose of engaging in activities of education, science and technology, culture and hygiene.”¹⁰
- MOFCOM-AITEC is also an “affiliated” entity “subordinate” to China’s Ministry of Commerce. The “Notice of the Ministry of Commerce on the Establishment of Institutions” sets out that MOFCOM-AITEC is a “Public Institution[] Directly under the Ministry of Commerce.”¹¹ MOFCOM’s website similarly lists MOFCOM-AITEC as a “public institution under the Ministry of Commerce.”¹² Further, Article 3 of the “Regulations on the Personnel Management of Public Institutions” indicates that the “competent departments of public institutions [e.g., MOFCOM] shall be specifically *responsible for* the personnel management of their *affiliated* public institutions [e.g., MOFCOM-AITEC].”¹³ And MOFCOM’s 2019 annual budget states that “[w]ork units under the Ministry of Commerce budget include ... *subordinate* public institutions,”¹⁴ of which MOFCOM-AITEC is one.
- MOFCOM-AITEC’s budget is also part of MOFCOM’s budget, such that the salary for Ms. Zhao’s Vice President position at MOFCOM-AITEC is funded by the Government of the People’s Republic of China.¹⁵ For example, MOFCOM’s 2019 annual budget states that “[w]ork units under the Ministry of Commerce budget include ... subordinate public institutions.”¹⁶ The 2019 budget lists 33 constituent “work units” that fall under it, including both MOFCOM itself as well as MOFCOM-AITEC.¹⁷ MOFCOM’s 2019

⁹ Notice of the Ministry of Commerce on the Establishment of Institutions, Section III (listing the “Public Institutions Directly Under the Ministry of Commerce”).

¹⁰ Interim Regulation on the Registration of Public Institutions, Article 2.

¹¹ Notice of the Ministry of Commerce on the Establishment of Institutions, Section III.

¹² MOFCOM Website, Organization.

¹³ Regulation on the Personnel Management of Public Institutions, Article 3 (third paragraph) (*italics added*).

¹⁴ MOFCOM 2019 Budget, p. 6. This is also represented graphically on p. 7.

¹⁵ MOFCOM-AITEC’s status as a public institution that is affiliated with and subordinate to MOFCOM demonstrates that her position as Vice President, and one of six “leaders” of that entity, is not a function independent of the Government of the People’s Republic of China. *See* Recommendations by the Preparatory Committee for the WTO approved by the Dispute Settlement Body on 10 February 1995 (WT/DSB/1), para. 7 (expressing a view that “[t]his requirement [of not having an attachment to a government] would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government”).

¹⁶ MOFCOM 2019 Budget, p. 6. This is also represented graphically on p. 7.

¹⁷ MOFCOM 2019 Budget, p. 7 (listing MOFCOM-AITEC in row 23).

budget indicates aggregate expenses for salaries, which would reflect the amount for all 33 constituent “work units”, including MOFCOM-AITEC.¹⁸ China’s National Audit Office carried out in 2016 an audit of MOFCOM’s 2015 budget, and this audit indicates specific amounts from MOFCOM’s budget allocated to and expended by MOFCOM-AITEC for salary expenses.¹⁹

- None of this information was disclosed to WTO Members when this individual was nominated as a candidate for the Appellate Body.
- In sum, Ms. Zhao is Vice-President of MOFCOM-AITEC, a “public institution” that is “affiliated,” “directly under,” and “subordinate” to MOFCOM. Salary expenses of MOFCOM-AITEC form part of MOFCOM’s budget, which means the government funds Ms. Zhao’s MOFCOM-AITEC salary. Thus, Ms. Zhao is affiliated with the Government of the People’s Republic of China.
- Because Ms. Zhao is not “unaffiliated with any government,” contrary to the requirement of Article 17.3 of the DSU, Ms. Zhao is not a valid member of the Appellate Body.
- This alone renders the document circulated as WT/DS505/AB/R invalid and incapable of being an Appellate Body report because the appellate “report” has not been provided and circulated on behalf of three Appellate Body members, as required under DSU Article 17.1.
- There are, in addition, two further reasons the document is not an Appellate Body report within the meaning of Article 17.
- With respect to Mr. Bhatia and Mr. Graham, the terms for these individuals expired on December 10, 2019.²⁰ The document was circulated to WTO Members on February 6, 2020, nearly two months after their terms had expired.
- The DSB had taken no action to permit either individual to continue to serve as an Appellate Body member. Therefore, neither individual was an Appellate Body member on the date of circulation of this document.
- The document is also not a valid Appellate Body report because it was not issued within 90 days, consistent with Article 17 of the DSU. The mandatory language in Article 17.5

¹⁸ MOFCOM 2019 Budget, p. 17.

¹⁹ Central Department Work Units 2015 Budget Implementation and Other Matters Audit Results (National Audit Office, Announcement Number 5 (2016), June 29, 2016), Ministry of Commerce 2015 Financial Appropriations Budget Implementation Status for Key Audit Work Units, Appendix 2.

²⁰ Dispute Settlement Body, Minutes of the Meeting Held on November 25, 2015 (WT/DSB/M/370), para 7.3 (“[H]e wished to propose that the DSB agree, at the present meeting, to reappoint Mr. Ujal Singh Bhatia and Mr. Thomas Graham for a four-year term, respectively, starting on 11 December 2015.”) and para. 7.4 (The DSB so agreed.”).

of the DSU states: “In no case shall the proceedings exceed 90 days.” And that provision specifically states that “the proceedings” encompass “the date the Appellate Body circulates its report.”

- In fact, 528 days passed between the date of the Notice of Appeal in this dispute (August 27, 2018) and circulation of the document as a purported Appellate Body report (February 6, 2020).
- Any one of these three reasons would suffice to prevent this document from serving as an Appellate Body report. But the concerns raised by the service of Ms. Zhao are compounded when Members consider the substance of this appeal.
- Members may recall that one appeal in this dispute involved an alleged unwritten measure that was considered “ongoing conduct”. The evidence that allegedly demonstrated the existence of that “ongoing conduct” measure consisted of actions by the U.S. Department of Commerce in 9 investigations. One of those involved Canada, and the countervailing duty was terminated in the course of this proceeding. Another investigation involved India. And 7 of the 9 investigations involved subsidies provided by China.
- Thus, this individual, affiliated with the Government of China, participated in an appeal in which the conduct complained about related almost exclusively to China.
- And so, besides the invalidity of this individual to serve on the Appellate Body, their participation in this particular appeal is impossible to see as impartial.
- The United States has serious substantive concerns about the appellate document as well. But given the invalidity of this individual to serve on the Appellate Body, it is not necessary to consider that document further. There is no Appellate Body report before the DSB today, and the United States objects to the adoption of this document.
- As discussed, the document has not been issued by three Appellate Body members and was not issued within 90 days, consistent with the requirements of Article 17 of the DSU, it is not an “Appellate Body report” under Article 17, and therefore it is not subject to the adoption procedures reflected in Article 17.14.
- Rather, the DSB may consider its adoption subject to the positive consensus rule that governs DSB decisions, pursuant to DSU Article 2.4 and WTO Agreement Article IX:1, note 3.
- In light of the significant procedural and substantive concerns with the document, as discussed in this statement, the United States objects to its adoption.
- The United States does not consider it appropriate to proceed with adoption of the

appellate report in light of this extraordinary and unprecedented situation.

- Under the circumstances, it would be appropriate to suspend consideration of this item to allow the parties to consult on a path forward.

Second Intervention

- China does not appear to directly contest the substance of the U.S. statement. China did not deny the following:
 - Ms. Zhao serves as Vice President of MOFCOM-AITEC.
 - Ms. Zhao receives or has received a salary for her position of Vice President.
 - MOFCOM-AITEC is an “affiliated” entity “subordinate” to MOFCOM.
 - MOFCOM-AITEC’s budget is part of MOFCOM’s budget, such that the salary for Ms. Zhao’s Vice President position at MOFCOM-AITEC is funded by the Government of the People’s Republic of China.
- If China considered these statements incorrect, we would expect them to have stated so explicitly. The fact that they did not would seem to confirm that Ms. Zhao is affiliated with the Government of China.
- China claims that MOFCOM-AITEC is an “independent legal entity.” This assertion does not address – much less contest – evidence demonstrating that MOFCOM-AITEC is an “affiliated” public institution under Chinese law “subordinate” to MOFCOM.
- China explicitly identifies MOFCOM-AITEC’s status as a “public institution.” Under Chinese law, a “public institution” refers to “public service organizations that are established by the state organs or other organizations by using the state-owned assets for the purpose of engaging in activities of education, science and technology, culture and hygiene.”
- Further, the “Notice of the Ministry of Commerce on the Establishment of Institutions” sets out that MOFCOM-AITEC is a “Public Institution[] *Directly under the Ministry of Commerce.*” MOFCOM’s website similarly lists MOFCOM-AITEC as a “public institution under the Ministry of Commerce.”
- China has now confirmed that MOFCOM-AITEC is funded, at least in part, by the Chinese government. And, as discussed, official Chinese documents indicate that salaries for MOFCOM-AITEC personnel were part of MOFCOM’s budget.

- China's attempt to analogize MOFCOM-AITEC to entities in other WTO Members is not compelling and, ultimately, irrelevant to the question of whether Ms. Zhao is affiliated with the Government of China.
- Moreover, had Ms. Zhao's affiliation with the Government of China been properly disclosed, it would have been for WTO Members to decide whether they considered the circumstances analogous to what they may have in their domestic systems. The lack of transparency and disclosure deprived WTO Members of this opportunity and of making an informed decision on whether to appoint Ms. Zhao to the Appellate Body.
- We have focused our statement on the document circulated as WT/DS505/AB/R because of the extraordinary situation that renders that document invalid. To reiterate, the United States will not join a consensus to adopt that document.
- This agenda item also concerns the report of the panel in this dispute.
- The duties at issue in this dispute were terminated in July 2018. Therefore, the United States did not appeal the many legal findings of the panel with which the United States strenuously disagreed because reversal of those findings was not necessary to resolve the dispute.
- As the United States appealed certain legal findings of the panel, and the appeal has not been completed with the issuance of a valid Appellate Body report, the panel report cannot be considered for adoption by the DSB by negative consensus under Article 16.4 of the DSU.
- However, under the circumstances of this dispute, where the duties at issue were already terminated in July 2018, the United States is willing to permit adoption by positive consensus of the legal findings of the panel that were not appealed; specifically, paragraphs 8.1, 8.2, and 8.3 of the panel report.
- We are willing to take this step to permit adoption of unappealed panel findings in the spirit of compromise and because neither party should be prejudiced by the service on this appeal of an individual with no right to serve, and the issuance of a document on appeal with no validity.

Third Intervention

- The United States has described serious procedural and substantive concerns with the document circulated as WT/DS505/AB/R. We have explained how the document cannot be an Appellate Body report because of ex-Appellate Body members' continuation of service without authorization by the DSB, and the failure to adhere to the deadline in Article 17.5.
- Most importantly, the United States has explained in detail that an individual who served

on this appeal is not a valid member of the Appellate Body given that they are affiliated with a government in breach of DSU Article 17.3. And even beyond that, the appeal directly implicated the interests of that Government.

- Accordingly, the United States reiterates its view that the document before the DSB today is not a valid Appellate Body report, objects to adoption of the document, and does not join a consensus to adopt it. Any assertion that the WTO has today adopted an appellate report under these extraordinary and illegal circumstances would only damage the credibility of the WTO and its dispute settlement system.
- To reiterate, and in the spirit of compromise, the United States would only have joined a positive consensus to adopt those aspects of the panel report that were not appealed.